No. 96.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellants,*

—*against*—

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, CAROLINE K. SIMON, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Election constituting the Board of Elections of the City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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Opinions Below

The three separate opinions of the three-judge District Court (R. 150-177) are reported at 211 F. Supp. 460.

Jurisdiction

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. On November 26, 1962 the Court entered a judgment dismissing the complaint (R. 178). A Notice of Appeal was filed in the District Court on January 23, 1963 (R. 179-180). Jurisdiction of this Court to review the judgment below is conferred by 28 U. S. C. § 1253. This Court noted probable jurisdiction (R. 244).

Questions Presented

1. Whether appellants sustained their burden of proving that the portion of Chapter 980 of the 1961 Laws of the State of New York which delineates the boundaries of the Congressional districts in Manhattan Island segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment.

2. Whether a statute which segregates persons by race or place of origin may be declared constitutional on the ground (a) that no proof of specific harm to the individuals subject to the statute, other than the segregation, has been adduced at trial or (b) that the segregation is benign in its effect.

3. Whether plaintiffs attacking the constitutionality of a state statute must, in addition to proving that the statute has the demonstrable effect of segregating persons by race or place of origin, also prove that the "motive" of the legislature was to produce that effect.

4. Assuming, *arguendo*, that both effect and motive must be shown (a) whether plaintiffs, in the absence of

proof by defendants, must affirmatively prove that a legislative motive to segregate is the "only available inference", and (b) whether a court may sustain the constitutionality of the statute by inferring an alternative legislative motive regarding which there is no evidence in the record and which is not a proper subject of judicial notice.

Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are the Fourteenth and Fifteenth amendments to the United States Constitution, 2 U. S. C. § 2(a), 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. §§ 1343, 2201, 2202 and 2281, and Chapter 980 of the 1961 Laws of New York. Their pertinent provisions are set forth in Appendix B to the Jurisdictional Statement.

Statement

Proceedings Below

On November 9, 1961, the Joint Legislative Committee on Reapportionment recommended to an extraordinary session of the New York State Legislature a statute redrawing the boundaries of the Congressional districts of the state in accordance with the 1960 Federal census, as required by 2 U. S. C. § 2(a), N. Y. Leg. Doc. No. 45 (1961), set forth in Appendix B to the Jurisdictional Statement. No hearings were held and no debates recorded, and the statute was passed without change and signed by the Governor on the next day. N. Y. Sess. Laws, Extraordinary Sess. 1961, c. 980 §§ 110-12.

On July 26, 1962, appellants filed a civil complaint pursuant to the Civil Rights Act, 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. § 1343, in which they challenged that portion of

the statute which delineates the boundaries of the four Congressional districts which are wholly contained, and comprise all of the districts, in New York County (the Island or Borough of Manhattan). Appellants are residents and registered voters in each of these four districts. The appellees named in the complaint are various state and city officials charged with the administration of the statute. The complaint alleges that the challenged portion of the statute segregates eligible voters in Manhattan on the basis of race and place of origin in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment. The complaint seeks a judgment pursuant to 28 U. S. C. § 2201 declaring the challenged portion of the statute unconstitutional and restraining the defendants in the enforcement thereof and, in the event such declaration does not lead to corrective legislation, additional equitable relief.

On motion of appellants and after hearing, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284 (R. 21-22).

At the opening of the trial before the three-judge court, Adam Clayton Powell, the then incumbent Congressman from one of the pre-1961 Congressional districts, and five other individuals, alleging *inter alia* that "Negroes and Puerto Ricans now control" the new 18th Congressional District in Manhattan, which they alleged had "retained heavily its Negro and Puerto Rican character under the present redistricting," were permitted to intervene as defendants (R. 14-18).

Appellants' evidence at the trial, summarized below, consisted of charts, statistical tables, and expert testimony. At the close of appellants' case, no evidence was offered by the State (R. 105-6) with the exception of historical maps supplied in response to the specific request of the court, a table

from the Bureau of Census* and a message from the President to the Congress. See Defts.' Exhs. A-H (R. 216-42, 106, 130-131). In its answer, the State pleaded no affirmative defenses (R. 19-20). The intervenors failed to introduce evidence in support of the affirmative defenses alleged in their pleading (R. 106); there thus being no evidence in the record to support these alleged defenses, the court below refused to consider or pass upon them (R. 175).

The court dismissed the complaint by a divided vote (R. 178). Each of the three judges wrote separate opinions, which are summarized below.

Appellants' Proof

Appellants introduced maps showing the boundaries of the four Congressional districts on Manhattan Island and extensive data showing the distribution on the Island of the white, non-Puerto Rican population, on the one hand, and the non-white, Puerto Rican population on the other. The non-white Puerto Rican classification derives from the census figures for New York City, which separately classify Negroes, other non-whites and persons of Puerto Rican origin (R. 61, Defts.' Exh. A, R. 217, 106). New York City agencies also separately classify persons of Puerto Rican origin for various purposes. See, e.g., N. Y. City Board of Education, TOWARD GREATER OPPORTUNITY 155 (1960).

The following table, from Pltfs.' Exh. 3 (R. 201), shows the population and racial group composition of the four districts:

*The table made the irrelevant point that the expanded 17th District contained a few more non-whites and Puerto Ricans than the old 17th District. However, as appellants showed, the percentage of non-whites and Puerto Ricans in the 17th District was reduced from 6.6% to only 5.1% despite an almost 50% increase in its population, see *infra* p. 7.

District	Total Population	White Population	White % of District	Non-White and Puerto Rican Origin Population	Non-White and Puerto Rican Origin % of District
17th	382,320	362,668	94.9%	19,652	5.1%
18th	431,330	59,216	13.7%	372,114	86.3%
19th	445,175	318,223	71.5%	126,952	28.5%
20th	439,456	318,482	72.5%	120,974	27.5%
Total	1,698,281	1,058,589	62.3%	639,692	37.7%

In order to give a visual picture of the racial and group composition of some of the borderline areas, appellants prepared a map which roughly shows the relative concentration of non-whites and Puerto Ricans in these areas. See Pltfs.' Exh. 4 (R. 202-205, 51). It should be noted that the shadings on this map show the racial and group composition of full census tracts only (R. 49, 50)—census tracts being areas of several square blocks, usually six or so, selected by the Bureau of Census to permit convenient tabulation of census figures (R. 42). It was only after Pltfs.' Exhs. 3 and 4 had been prepared that appellants were able to obtain from the Bureau of Census figures making possible a breakdown of some of the full census tract figures on a house-by-house basis (Pltfs.' Exh. 5, R. 49, 50, 61, 63). These detailed figures, which are included in the record as Pltfs.' Exh. 5 (R. 207, 63), show that the number and percentage of non-whites and Puerto Ricans within the 18th and 19th Districts and outside the 17th District is considerably greater than Pltfs.' Exhs. 3 and 4 would indicate (R. 63, 66, 69-75).

The testimony showed that the 11-sided, step-shaped boundary between the 17th and 18th Districts cuts through two census tracts, the racial and group composition of which, according to the house-by-house figures, is as follows (R. 63-66):

	Non-White Puerto Rican Population	Total Population	Non-White, Puerto Rican Population as % of Total
In 17th	513	11,239	4.5
In 18th	1,935	8,553	22.6

The 18-sided boundary line between the 17th and 19th cuts through 10 census tracts, the racial and group composition of which, analyzed on a house-by-house basis, is as follows (R. 69-75):*

	Non-White Puerto Rican Population	Total Population	Non-White, Puerto Rican Population as % of Total
In 17th	2,933	25,782	11.4
In 19th	6,690	35,100	19.1

As a result of the 1960 census, the number of Congressional districts in Manhattan was reduced from six to four. Although this reduction required expansion of the four remaining districts, the 17th remained 15.4% smaller than the adjacent 19th, 14% smaller than the 20th, 12% smaller than the 18th and more than 40,000 short of one-fourth of the Island's population. The following table shows the racial and group composition of the 17th District before and after the challenged statute (R. 216):

	Non-White Puerto Rican Population	Total Population	Non-White, Puerto Rican Population as % of Total
Old 17th	17,176	260,235	6.6
New 17th ...	19,652	382,320	5.1

In expanding the 17th, the 1961 statute altered its boundaries in three respects: it added one area on the upper east side from 57th Street to 89th Street; added an area on

*In only one such tract is there a higher percentage of non-whites and Puerto Ricans in the 17th than in the 19th, but the number in the 17th is only 241 (R. 71).

the lower east side known as Stuyvesant Town; and dropped from the 17th and added to the 18th District a two-block area from 98th to 100th Streets and from Fifth to Madison Avenues. The racial composition of these three areas is shown in the following table (R. 76-77, 85-86):

	Non-White Puerto Rican Population	Total Population	Non-White, Puerto Rican Population as % of Total
Upper east side added to 17th	2,749	101,716	2.7
Stuyvesant Town added to 17th	105	22,405	0.5
Two-block area dropped from 17th and added to 18th	359	806	44.5

Appellants also introduced statistics showing the effects of two hypothetical expansions of the 17th District as drawn by the legislature so as to make it equal in population to approximately one-fourth of the total of the Island.

The first hypothetical expansion of the district assumed that the western boundary of the 17th was straightened to follow Eighth Avenue and Central Park West along its entire length, that Stuyvesant Town was not added on the south and that enough full census tracts were added on the northern boundary to bring the population to about one-fourth of the total for the Island. The racial and group composition of this hypothetical district compares as follows with the actual 17th District (R. 82-83):

	Non-White Puerto Rican Population	Total Population	Non-White, Puerto Rican Population as % of Total
Hypothetical Expanded District	59,486	425,014	13.9
Actual 17th District	19,652	382,320	5.1

The second hypothetical expansion assumed that the western boundary of the 17th was straightened as above, that its northern boundary was straightened to eliminate the two cut census tracts (by extending it across 98th Street to Third Avenue and then south on Third to 89th) and that enough census tracts were added on the south to bring its total population up to about one-fourth of the total for the Island. The racial and group composition of this hypothetical expansion of the existing district by comparison with the actual 17th is as follows (R. 86-87):

	Non-White Puerto Rican Population	Total Population	Non-White, Puerto Rican Population as % of Total
Hypothetical Expanded District	36,134	427,351	8.5
Actual 17th District	19,652	382,320	5.1

Appellants also produced on trial three additional hypothetical plans, each of which would have divided the Island into four districts of roughly equal population, using full census tracts and well-known streets and arteries as dividing lines—together with the racial and group distribution produced by each plan. See Pltfs.' Exhs. 6A, 6B, 6C (R. 208, 210, 212; 90). Plan A created Southern and Northern and East and West Side districts, and produced the following distribution of the Island's non-white and Puerto Rican population (R. 89, Pltfs.' Exh. 6A, R. 208):

District	Total Population	Non-White and Puerto Rican Population as % of Total
Southern	421,284	22.3%
Eastern	429,069	32.2%
Western	424,269	37.1%
Northern	423,659	59.1%

Under Plan B three east-west lines would be drawn across the Island (much like the lines drawn across the Island in the 1911 districting). (Defts.' Exh. C, R. 232, 131) thereby creating the same Northern and Southern districts as under Plan A, but also creating South Central and North Central districts. The population and percentage of non-whites and Puerto Ricans would be as follows (Pltfs.' Exh. 6B, R. 210, 89-90):

District	Total Population	Non-White and Puerto Rican Population as % of Total
Southern	421,284	22.3%
South Central ..	419,129	9.5%
North Central ..	434,209	58.9%
Northern	423,659	59.1%

Under Plan C the Island would be divided centrally from 14th Street North to the Harlem River, thereby creating Southeast, Southwest, Northeast and Northwest districts. The population and percentage of non-whites and Puerto Ricans would be as follows (Pltfs.' Exh. 6C, R. 212, 90):

District	Total Population	Non-White and Puerto Rican Population as % of Total
Southeast	430,655	22.4%
Southwest	418,630	31.6%
Northeast	422,156	43.0%
Northwest	426,840	53.8%

On cross examination, appellant's witness gave additional statistics showing the racial and group composition of the borderline areas of the 17th. The area between 89th and 94th Streets and between Third Avenue and the East

River, which is just outside the 17th, has a total population of 10,507 persons of which 5% or less are non-white and Puerto Rican. Appellants introduced as exhibit 7 (R. 214, 120) a letter from the New York City Housing Authority stating that this area has since May 1959 been scheduled for a low-cost publicly assisted housing project, currently under construction, of the type in which the average non-white and Puerto Rican occupancy is about 75% in Manhattan. Appellants' witness further testified that the area between 14th and 19th Streets and First and Third Avenues has a total population of 6,862 of which 12.2% or 837 are non-whites and Puerto Ricans (R. 99). He also testified that the area between 34th and 42nd Streets and Sixth and Eighth Avenues, which is contained in the 17th, has a total population of 758, of which 24.4%, or 185, are non-whites and Puerto Ricans, and that the area between 34th and 42nd Streets and Eighth and Tenth Avenues which is outside the 17th and inside the 19th, has a total population of 5,824, of which 16.3%, or 949, are non-whites and Puerto Ricans (R. 102-03).

Opinions Below

Judge Moore took the position that racially segregated voting districts are constitutional absent a showing of serious underrepresentation or other specific harm to the individuals concerned. He stated that plaintiffs "must show more than a mere preference to be in some other district and associated for voting purposes with persons of other races or other countries of origin" (R. 159) and noted that "plaintiffs have not even shown that their voting status will be changed in any way" (R. 162-3).

Judge Moore also took the position that segregated voting districts could be constitutionally justified, or even constitutionally required, because they may enable persons

of the same race or place of origin "to obtain representation in legislative bodies which otherwise would be denied to them" (R. 164).

Even if segregated voting districts could violate the Constitution, Judge Moore was of the opinion that they could be unconstitutional only if the legislature's "motive" was to create such districts; that plaintiffs must introduce proof of this "motive"; and that, in this case, no such proof was tendered by the plaintiffs (R. 163).

Judge Feinberg disagreed with Judge Moore's view that segregated voting districts are constitutional absent serious underrepresentation, stating that the "constitutional vice [is] the use by the legislature of an impermissible standard and the harm to plaintiffs that need be shown is only that such a standard was used" (R. 171). Judge Feinberg also disagreed with the view that segregated districts could be constitutionally justified by alleged advantages to persons of a particular race or place of origin. In Judge Feinberg's opinion, "good" segregation is as repugnant as "bad" segregation (R. 173).

However, Judge Feinberg agreed with Judge Moore that plaintiffs must show a legislative "motive" or "intent" to segregate as a prerequisite to a finding of unconstitutionality (R. 174, 176). He cast his deciding vote on the grounds that plaintiffs have a "difficult burden" to meet in attacking the constitutionality of a state statute, citing cases not involving racial segregation, that plaintiffs must prove that such segregation is the "only available inference," even in the absence of any proof by the defendants (R. 176); that plaintiffs' evidence in this case "might justify" a finding of a legislative motive to segregate, but that other inferences are "equally" persuasive (R. 176, 177). The only such inference specifically cited by Judge Feinberg

was that the legislature intended to classify persons by "social and economic background," (R. 177), an inference regarding which there was no evidence whatever in the record.

In his dissent, Judge Murphy agreed with Judge Feinberg as to the applicable constitutional standards. But on his view of the record, the plaintiffs carried their burden of proving that "the legislation was solely concerned with segregating white, and colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (R. 167); that the legislation had effected "obvious segregation" (R. 170); and that the statute constituted a "subtle exclusion of Negroes from the 17th" and a "jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors" (R. 170). Accordingly, Judge Murphy thought plaintiffs had met their burden of proving segregation within *Hernandez* v. *Texas*, 347 U. S. 475, 479-81 (1954), and, in the absence of any proof by the state or by intervenors, were entitled to a judgment declaring the statute unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

Summary of Argument

I.

A. Segregation of Congressional districts by race and place of origin violates the Fourteenth Amendment.

It is no longer open to argument that separate classification of persons by race or place of origin in respect of any public institution or facility constitutes an "invidious discrimination" prohibited by the Fourteenth Amendment. *Johnson* v. *Virginia*, 373 U. S. 61, 62 (1963). Such classi-

fication is inherently unequal, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and no rule of reasonableness, such as that applicable in cases involving non-invidious classifications, may be employed to sustain it. *Ferguson* v. *Skrupa*, 372 U. S. 726, 732 (1963).

Because Congressional Districts are public institutions, their segregation produces inherent inequality as much as segregation in, for example, courtrooms, *Johnson* v. *Virginia*, *supra*, and they likewise fall within the 14th Amendment invidious discrimination rule. Moreover, States must be held to especially high standards in the creation of Congressional districts since they involve the franchise, which is basic to all other rights, and since the States, in creating them, are performing a function specifically delegated by Article I, § 2 of the Constitution and by an Act of Congress (2 U. S. C. § 2 (a)). Finally, use of invidious classifications in creation of Congressional districts must be specially scrutinized because of the ease with which a legislative majority can, as here, manipulate the district lines to the permanent detriment of those who are thus denied effective representation. *Cf. Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

B. Appellants proved that the purpose and effect of the statute here challenged was to create invidiously discriminatory Congressional districts. All of their proof pointed to one central conclusion: that the legislature could not have more completely segregated on the basis of race and place of origin. It could not, on an Island with nearly 40% non-whites and Puerto Ricans, have created a single district with a higher percentage of white, non-Puerto Ricans than the 17th (94.1%) and another district with a higher percentage of non-whites and Puerto Ricans than the 18th (86.3%)—unless, of course, the population of these two already undersized districts were fur-

ther reduced). As shown by the detailed statistics and maps introduced by appellants at trial, the district lines are gerrymandered without apparent reason; any expansion of the 17th, which is 12-15% smaller than the other three districts, would increase the number and percentage of non-whites and Puerto Ricans within its boundaries; any straightening of the highly irregular 35-sided boundary of the 17th, and particularly the boundary between the 17th and 18th, would detract from the racial homogeneity of both districts; the changes effected by the 1961 statute serve to minimize the non-white, Puerto Rican population of the 17th District and maximize the non-white, Puerto Rican population of the 18th; and use of reasonably objective criteria for dividing the Island into four districts could not achieve a comparable pattern of segregation.

C. The foregoing proof was at least sufficient to raise a rebuttable presumption of unconstitutionality and to shift the burden of producing evidence to the State. *Hernandez* v. *Texas*, 347 U. S. 475, 479-81 (1954); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960). In the absence of rebuttal evidence by the state or the intervenors, appellants were entitled to a judgment in their favor.

A factual pattern of segregation, even if unintended by the legislature, violates the Fourteenth Amendment. See *Eubanks* v. *Louisiana*, 356 U. S. 584, 588 (1958); *cf. N. A. A. C. P.* v. *Button*, 371 U. S. 415, 439 (1963). But even if legislative purpose were deemed Constitutionally relevant, plaintiffs need not show as part of their *prima facie* case that the state's purpose was to segregate. Once a factual pattern of segregation has been proved by plaintiffs, evidence of a purpose other than to segregate must be alleged and proved by defendants as an affirmative defense. However, plaintiffs in this

case, out of an abundance of caution, did in fact prove purposeful segregation. (In the absence of relevant legislative history, plaintiffs' proof of legislative purpose consisted of inferences drawn from the effects of the statute and from the effects of objective alternatives.)

It would also be Constitutionally irrelevant if the legislature, while intending to create segregated districts, did so in order to favor the non-whites and Puerto Ricans on the Island. See *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960); *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961). In any event, the burden of introducing evidence to show that the creation of segregated districts in Manhattan benefits non-whites and Puerto Ricans, even if Constitutionally relevant, would be upon the State or the intervenors, who failed to introduce such proof in this case.

D. The prevailing judges in the court below applied Constitutional standards and measures of proof which in effect permit unbridled segregation. Judge Moore apparently regarded segregated Congressional districts as Constitutional unless such segregation is coupled with substantial under-representation of the group thus segregated. Judge Feinberg, while applying proper Constitutional standards, erroneously believed that plaintiffs must prove as part of their *prima facie* case that the legislative "motive" was to segregate and, further, that such "motive" is the *"only* available inference." Properly, plaintiffs had only to show that invidious discrimination was a sufficiently reasonable inference to warrant shifting the burden to the State to produce rebuttal evidence. Even so, Judge Feinberg was able to avoid the force of the uncontradicted proof of purposeful segregation in this case only by speculating beyond the record and by grossly misreading the facts contained in the record.

II.

The Fifteenth Amendment also bans the segregation of voters into racially separate voting districts. See *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). The "separate but equal" doctrine has never been applied in Fifteenth Amendment cases, see *Smith* v. *Allwright*, 321 U. S. 649 (1944) and *Terry* v. *Adams*, 345 U. S. 461 (1953), and an abridgment of voting rights in the Fifteenth Amendment sense thus occurs from segregated voting, even absent the loss of the right to vote in the same or similar elections. Moreover, in this case, an abridgment of voting rights has occurred by reason of the fact that virtually all non-whites and Puerto Ricans of Manhattan have been placed in districts in which their votes count 12-15% less than the votes of the residents of the all-white 17th District.

Hence, the record in this case, discussed above in relation to the Fourteenth Amendment, also establishes segregation of Congressional districts and under-representation of non-whites and Puerto Ricans in violation of the Fifteenth Amendment.

III.

The relief requested is a judgment pursuant to 28 U. S. C. § 2201 declaring the challenged portion of the statute unconstitutional. Such relief would leave the legislature adequate time prior to the 1964 Congressional elections to adopt a new statute either at its regular session, which convenes in January 1964, or at an extraordinary session such as that at which the challenged statute was adopted.

Declaratory relief of this type has proven effective elsewhere in causing the legislatures to redistrict in accordance with constitutionally permissible standards. It need not impair the ability of the encumbent Congressmen to serve out their terms.

ARGUMENT

I. The Challenged Portion of the Statute Segregates Congressional Districts by Race and Place of Origin in Violation of the Fourteenth Amendment.

A. The Constitutional Standard

Although this is the first case in this Court challenging segregation in the creation of Congressional districts, it should be governed by the Constitutional standards which have been elaborated in other segregation cases.

It is now clear that the Equal Protection Clause of the Fourteenth Amendment bars all classifications based upon race or place of origin*. While the States may classify citizens for regulatory purposes on whatever other grounds they will so long as the classification is based upon "differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud*, 344 U. S. 457 (1957), whenever a State separately classifies any "easily identifiable group [requiring] the aid of a court in securing equal treatment under law . . .", this rule of reason is inapplicable. *Hernandez* v. *Texas*, 347 U. S. 475, 478 (1954). Such segregation or "invidious discrimination" is outlawed no matter what reasonable grounds the State may advance to justify it. *Ferguson* v. *Skrupa*, 372 U. S. 726, 732 (1963).

This rule barring invidious discriminations applies in cases of segregation of Congressional voting districts as well as in cases of segregation of public schools, places of public amusement, courtrooms and other public facilities.

*The Due Process clause also proscribes all invidious discriminations, and its coverage appears co-extensive with that of the Equal Protection Clause. Compare *Bolling* v. *Sharpe*, 347 U. S. 497 (1954) with *Brown* v. *Board of Education*, 347 U. S. 483 (1954). And see *Griffin* v. *Illinois*, 351 U. S. 12, 17 (1956) and *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

Johnson v. *Virginia*, 373 U. S. 61, 62 (1963). Contrary to the apparent view of Judge Moore in the court below, Congressional districting should not be held to fall outside the rule on the ground that its harmful effects are less apparent. The rule assumes that invidious discriminations between classes of citizens result in harm constituting a deprivation of Constitutional rights. Separate classifications based upon race or place of origin are inherently unequal. *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

As illustrated by this case, the harm which necessarily flows from invidious discriminations between classes of citizens in drawing Congressional district boundaries is at least as inevitable as that which results from segregation of schools, courtrooms and other public facilities. The presumption of harm resulting from invidious discriminations is doubly warranted in a case involving Congressional districts because of the ease with which a legislative majority, free to engage in such discriminations, can manipulate districts to the permanent detriment of the group discriminated against. This manipulation can be accomplished behind the scenes in the legislative process by which district lines are drawn and may be obscured by seemingly innocuous enactments. In this case, the Negroes and Puerto Ricans of Manhattan, have been jammed into a single Congressional district. They have thus been foreclosed from the exercise of any effective political power in the other three districts of the Island, despite the fact that they constitute nearly 40% of the total population. Were the district boundaries drawn without regard to considerations of race or place of origin, as illustrated by appellants' hypotheticals, Negroes and Puerto Ricans would have more representation in Congress. They would have the pivotal votes in all four districts or a majority of the votes in two districts.

The inherent inequality of segregated Congressional districts also results from the fact that Congressional districts are important entities within which various public and private activities are necessarily organized. The badge of segregation is equally odious in these circumstances as in the case of the segregation of any other public institutions. While it is true that Congressional districts may have less impact upon the persons residing in them than, say, public schools upon their pupils, this fact should not affect the nature of the constitutional test to be applied. On the contrary, it could be grounds for holding the states to a higher standard because the encroachment upon the prerogatives of the State in barring discriminatory manipulation would be less serious than the prohibition of segregation in public school systems. The latter have traditionally been regarded as of solely local concern—whereas Congressional districts are Constitutionally created components of the national government.

The discredited "separate but equal" doctrine, even at the height of its influence, was not applied in cases involving voting rights, see *Nixon* v. *Herndon*, 273 U. S. 536 (1927), and *Nixon* v. *Condon*, 286 U. S. 73 (1932), invalidating separate white primaries without inquiring into the question of equality. It should not be applied in this day and age to justify the existence of segregated Congressional voting districts. Had the hurdle of justiciability not been present in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the Court would, it seems, have held the 14th Amendment invidious discrimination rule applicable in that case, which involved the boundaries of a municipality; Mr. Justice Whittaker, concurring in *Gomillion*, and Mr. Justice Douglas, in his separate opinion in *Baker* v. *Carr*, 369 U. S. 186, 244 (1962), made clear that in their view the segregation of voting districts would fall within the invidious discrimination rule of the 14th Amendment. Com-

mentators on the cases have taken the same position. See *Note*, 72 YALE L. J. 1041, 1061 (1963); Emerson, *Malapportionment and Judicial Power*, 72 YALE L. J. 64, 74 (1962).

Indeed, the States should be held to especially high Constitutional standards in the creation of Congressional districts because the manner in which the lines of Congressional districts are drawn is basic to all other rights under the Constitution—it determines the composition of the national legislature and the effectiveness of the franchise of the citizens of the States in selecting their representatives. The Civil War amendments to the Constitution reflect a special concern with the right to vote, as nearly a century of litigation in this Court has well demonstrated. See *e.g.*, *Nixon* v. *Herndon*, 273 U. S. 536 (1927). And, in drawing the boundaries of Congressional districts the States are performing a function which has been specifically delegated to them by Article I, § 2 of the Constitution and by an Act of Congress, 2 U. S. C. § 2(a). Hence, even if the Civil War amendments did not specifically require equal treatment of all citizens in regard to the franchise, the Constitution would nevertheless ban Congressional district statutes which discriminate against classes of voters. *McDougall* v. *Green*, 335 U. S. 281, 288 (1948) (dissenting opinion).

B. Appellants' Proof of Segregation

In the court below, appellants proved that the purpose and effect of the challenged portion of the statute was to create the type of invidious discrimination which the 14th Amendment prohibits. All of their proof showed that the legislature could not have created a more segregated pattern in the Congressional districts of Manhattan—that is, one virtually all white district (about 95% white, non-Puerto Ricans) and a second virtually all non-white-Puerto Rican

district (about 86% non-whites and Puerto Ricans) on an Island which is about 40% non-white-Puerto Rican.*

The absence of meaningful legislative history of the challenged statute made difficult appellants' efforts to prove the legislative purpose. The statute was adopted by the legislature, without public hearings or recorded debates, the day after it was first introduced into a two-day extraordinary session of the legislature. The only legislative history is a report issued by a special committee of the legislature which discusses only the question of the numerical disparities in the population of the districts throughout the entire State. See Jurisdictional Statement 9b-14b. The report does not remotely touch upon the question here involved—namely, the reasons for the configurations of the various districts and, in particular, for the crazy-quilt pattern of the four districts on the Island of Manhattan.

In order to prove purposeful segregation, appellants were therefore obliged, as is always the case when a State acts subtly rather than openly, to draw inferences from the effects of the statute and from objective alternatives. The irrationally gerrymandered configuration of the four Manhattan districts coupled with their otherwise inexplicable numerical disparities and racial and group composition are, without more, sufficient to compel an inference of legislative purpose to segregate by race and place of origin. The Island of Manhattan does not contain any natural political subdivisions, and the boundaries of the four Congressional districts do not generally follow what-

*Separate classification of non-whites and Puerto Ricans in New York County is the type of invidious discrimination which the Fourteenth Amendment proscribes. Both the Federal Census Bureau and local agencies recognize that Puerto Ricans are an "easily identifiable group" and, together with non-whites, require the "aid of the courts in securing equal treatment under law . . ." *Hernandez* v. *Texas*, 347 U. S. 475, 478 (1954). The court below, composed of judges familiar with local circumstances, did not question this view.

ever natural geographic subdivisions the Island might be deemed to have. For example, the boundary between the 17th and 18th Districts does not follow a major cross-town artery, such as 96th and 110 streets, but pursues obscure cross streets on its tortuous path; and the boundary between the 17th and 19th Districts, rather than following the border of Central Park and continuing south down 8th Avenue, a major north-south thoroughfare, undergoes four detours off side streets in covering the same distance. These irregular boundaries and the size differences must therefore reflect a legislative purpose to classify persons on some sort of subjective basis. The fact that the districts as drawn create one virtually all-white district and an adjoining virtually all Negro-Puerto Rican district, on an Island about 40% non-white and Puerto Rican, requires an inference that the subjective basis employed by the legislature was race and place of origin.

However, appellants further tested this inference by introducing various additional elements of proof. Thus, they analyzed some of the key border areas and found that expansion of the 17th in any direction would increase the percentage of non-whites and Puerto Ricans within its boundaries and that any straightening of the irregular boundaries of the 17th and particularly the boundary between the 17th and 18th would detract from the racial homogeneity of both districts. They examined the changes effected by the statute and found that they minimize the non-white, Puerto Rican population of the 17th District and maximize the non-white, Puerto Rican population of the 18th. They also proved that the use of reasonably objective criteria for dividing the Island into four districts could not achieve a comparable pattern of segregation.

Since it is the "totality of the circumstances" which must be weighed in determining the constitutionality of a

statute, *Johnson* v. *Virginia*, 373 U. S. 61 (1963), all of these elements of the appellants' proof must be viewed together; for simplicity of exposition, however, each will be discussed separately below:

1. *Expansion or straightening of the boundaries of the 17th and 18th Districts.* The two segregated districts, the 17th and 18th, are also the smallest districts and those with the most irregular boundaries, and neither could be expanded or have its boundaries straightened without significantly altering its racial homogeneity.

The maps introduced as Plaintiffs' Exhibit 4 visually demonstrate that any expansion of the 17th District or straightening of its lines would significantly increase its non-white and Puerto Rican population. The refinements of census tract data, showing that about 70% of the non-white Puerto Rican population in the full census tracts cut by the boundaries of the 17th actually falls outside the 17th, *supra*, p. 7, further strengthens this graphic demonstration of the purposeful creation of, in effect, an all-white district.

The boundary between the 17th and 18th is a conspicuously step-shaped configuration which cuts through two census tracts so as to place the bulk of the non-whites and Puerto Ricans in those tracts into the 18th and the bulk of the white, non-Puerto Ricans into the 17th. Had these two full tracts been placed in the 17th, the result would have been to add 8,553 persons to that district, 22.6% of whom would be non-white and Puerto Rican, *supra* at pp. 6-7. Had the full tracts been placed in the 18th, the result would be to add 11,239 persons to that district, 95.5% of whom would be white, non-Puerto Ricans, *ibid.* In either case the result would be to expand one of the two relatively small districts and decrease its racial homogeneity (assuming, of course, that the other district were expanded elsewhere so as to make up for its loss of population).

The purpose and effect of the irregular boundary between the 17th and 18th is made abundantly clear by more detailed analysis. The two-block area between 98th and 100th Streets and Fifth and Madison Avenues, which was the only area dropped from the old 17th and transferred to the 18th, contains 44.5% non-whites and Puerto Ricans, *supra*, p. 8. The one block from 97th to 98th Streets between Park and Madison Avenues, which is placed in the 18th by the next step down in the boundary, contains 32.3% non-whites and Puerto Ricans, compared with 3.5% in the rest of the same census tract which is placed in the 17th (R. 64).

The boundary between the 17th and 19th also illustrates the purpose and effect of the statute. If the ten cut census tracts on this boundary were placed entirely within the 17th, the result would be to increase its population by 35,100 persons, thus making both the 17th and 19th more nearly equal to one-fourth of the total for the Island, but the population added would be 19.1% non-white and Puerto Rican, *supra* p. 7. If the boundary between the 17th and the 19th were straightened to run along Central Park West and Eighth Avenue, the result would be to reduce the population of the 17th by 19,000 persons and to increase its percentage of non-whites and Puerto Ricans (R. 82). Although the area between 34th and 42nd Streets and Sixth and Eighth Avenues, which is just inside the western boundary of the 17th, has a slightly higher percentage of non-whites and Puerto Ricans than the district as a whole, it contains a total of less than 758 persons and could have been excluded from the district only by further gerrymandering of its boundaries (R. 102).

To demonstrate further the effect of expanding and straightening the boundaries of the 17th District, the appellants introduced statistics regarding two hypothetical alterations of the District, *supra* pp. 8-9. The hypothetical straightening and expansion to the north would result in a

population 14% non-white and Puerto Rican, as against 5.1% in the present 17th. The hypothetical straightening and expansion to the south would result in a population 8.5% non-white and Puerto Rican. Hence, these hypotheticals are further probative evidence of the purposeful segregation.

Inclusion in the 18th of the area bounded by 89th to 95th Streets and Third Avenue and the East River, referred to by the State in its Motion to Dismiss or Affirm, does not contradict the purpose and effect of segregation. That area contains only 10,507 persons (R. 99), and its addition to the 17th would still leave the population some 30,000 short of one-fourth of the Island. More important, the area has since May 1959 been scheduled for construction of a new low-cost public housing project of the type in which the average non-white Puerto Rican occupancy in Manhattan is almost 75% (R. 214). Its exclusion from the 17th and inclusion in the 18th was thus essential to continuation of the racial homogeneity of these two districts during the ten years before a new redistricting statute would normally be enacted.

Nor is the commercial and warehouse area outside the southwest end of the 17th District, also referred to by the State in its Motion to Dismiss or Affirm, inconsistent with the purpose and effect of segregation. It contains very few persons and could be added to the 17th only by bisecting the 19th or otherwise creating grotesque additional gerrymandering in the boundaries of the two districts.

2. *History of the 17th and 18th Districts.* The 17th and 18th districts appear to be the favored districts since they were the first two districts drawn by the statute and were carved out of the center of the Island. The other two appear to be merely filler districts designed to preserve the pattern established by the first two. The record shows that the 17th District, which alone among the four has an his-

torical continuity, had developed from a rectangle at the time it was first established in 1911 into its present 35-sided configuration (R. 232). And, as the intervenors stated in their pleading, the new 18th "retained heavily its Negro and Puerto Rican character under the present redistricting." (R. 17)

Although appellants did not find it necessary as part of their *prima facie* case to obtain the extensive statistical data which would be necessary to show that all of the historical shifts in the 17th and 18th districts corresponded to the shifts in white and minority groups population, as seems quite likely, they did introduce extensive statistical data regarding the changes made by the 1961 statute. This data clearly shows that the changes effected by that statute had the purpose and effect of segregating voters by race or place of origin.

Although reduction of the number of districts in Manhattan from six to four necessarily resulted in expansion of the 17th's population by about 50%, the percentage of non-whites and Puerto Ricans within its boundaries was actually reduced from 6.6% to 5.4%, *supra* p. 7. And despite this expansion, one area was inexplicably removed from the 17th District and placed in the 18th: the area then in the 17th with the highest population of non-white and Puerto Rican persons (44.5%) *supra* p. 8. Moreover, expansion of the 17th was accomplished by including all-white Stuyvesant Town without including an adjacent, more logically contiguous area containing a population with 12.2% non-whites and Puerto Ricans, a percentage 25 times as large as that of Stuyvesant Town. In order to omit these two areas, the legislature was obliged to make five unnecessary zig-zags in the boundaries of the district. The only two areas added to the 17th to accomplish the expansion were areas along the East River which had become virtually all-white, non-Puerto Rican (about 98%) at the time the statute was adopted.

The legislature could not have added additional population to the 17th to make it reasonably equal in population to one-fourth of the total for the Island without substantially increasing its non-white and Puerto Rican population. The conclusion is thus inescapable that the district was deliberately kept 12-15% smaller than the others so as to achieve the pattern of segregation which otherwise could not have existed.

The 1961 statute split one of the six former districts on the Island, adding a portion to the new 17th and a portion to the new 18th (See Defs.' Exh. G, R. 241, 131). The portion added to the new 17th had a white, non-Puerto Rican population of 97.3% (R. 7) while the portion added to the new 18th was overwhelmingly non-white and Puerto Rican (with the exception of the area, discussed above, which is scheduled for a low-cost public housing project) so that the 18th "retained heavily its Negro and Puerto Rican character." (R. 17).

3. *Use of Objective Criteria.* The purpose and effect of segregation is also apparent from drawing hypothetical district lines on the basis of reasonably objective criteria. Such criteria do not result in the creation of districts with anywhere near the same racial and group homogeneity as the present districts.

Manhattan being an island with no political and few natural geographic dividing lines, very few such criteria exist. One which is obvious is use of the boundaries of the full census tracts, which the legislative committee undoubtedly had available to it. (See Jurisdictional Statement 13b). The boundaries between the 17th District and the 18th and 19th do not follow the census tracts but, rather, cut through 12 such tracts. In all but one of the cut tracts, the percentage and total number of non-whites and Puerto Ricans inside the 17th is substantially smaller than in the adjoining area inside

the 18th or 19th District, and, overall, the percentage of non-whites and Puerto Ricans inside the 17th is about 9% and the percentage outside is about 20%, *supra* p. 7. Hence, had the full census tracts been utilized, the racial percentages of the three districts would have been significantly altered.

The only other wholly objective criterion available is regular geometric division of the Island into four districts, using major streets and the borders of Central Park as dividing lines. Appellants' three hypotheticals dramatically show that the use of these criteria do not result in racial and group homogeneity anywhere near that achieved in the present 17th and 18th Districts, *supra* pp. 9-10. The lowest percentage of non-whites and Puerto Ricans in any district in any of the three hypotheticals was 9.5% in the "South Central" district of "Plan B," double that in the present 17th. But, unlike the present statute, Plan B did not also result in a single district in which most of the non-whites and Puerto Ricans were jammed into a single district. Rather, it has *two* districts in which non-whites and Puerto Ricans constitute more than 50% of the population. In the remaining two hypotheticals, there is no district with less than 20% non-whites and Puerto Ricans, and each contains one district in which non-whites and Puerto Ricans constitute a majority of the population.

The conclusion from all of the foregoing is that the record establishes that the challenged portion of the statute purposefully created segregated Congressional districts. At the very least, the record sustains a sufficiently strong inference of purposeful segregation to have shifted the burden of rebutting this inference to the State and the intervenors and thus, in the absence of proof by them, to require judgment for the appellants.

C. Standard of Proof

There is no question that the statute would be unconstitutional if it had expressly provided for the establishment of one district to be composed of all-white, non-Puerto Ricans and another district to be composed entirely of non-white and Puerto Ricans. But a statute may be invidiously discriminatory even if it does not establish the discrimination by express terms, for as frequently has been stated, the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion* v. *Lightfoot*, 364 U. S. 339, 342 (1960).

Moreover, discrimination may be invidious without being so sweeping as to classify separately 100% of that class of citizens being discriminated against. This should be especially so in the case of Congressional districts, in which a minority group with only a small percentage of votes is as effectively foreclosed from participation in the life of the district as a group totally excluded. The classification need not be complete in order to bring into play the invidious discrimination rule of the 14th Amendment. Cf., *Gomillion* v. *Lightfoot*, *supra*, in which some 25% of the persons remaining in the all-white City of Tuskegee were Negroes. Lucas, *Gomillion* v. *Lightfoot*, SUPREME COURT REVIEW, 194, 198 (1961).

Furthermore, were a rule of 100% applied, urban Congressional districts would be immune from Constitutional scrutiny, for in drawing district lines in a heavily populated area, it is inconceivable that anything near 100% segregation could possibly be achieved even if the most deliberate and detailed methods were employed. And appellants have shown that no other drawing of the district lines in Manhattan could have resulted in two districts with greater racial homogeneity.

The fact that appellants did not introduce proof in the trial court to rebut the unproven allegation that the statute

benefits the group which is the subject of the segregation is irrelevant. As Judge Feinberg pointed out, "good" segregation is no more justifiable under the Constitution than "bad" segregation. The State must be entirely "neutral" and refrain itself from taking any action which results in an invidious discrimination which the 14th Amendment proscribes. See *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961). Note, 70 YALE L. J. 126 (1960); Bittker, *The Case of the Checker Board Ordinance*, 71 YALE L. J. 1387 (1962). Hence, even if it were proved that segregation of the Congressional districts in New York County were designed to ensure the intervenors in this case "control" of the 18th Congressional District (R. 17), that would only serve to emphasize the fact that unlawful segregation occurred.

Even if a beneficial effect could justify an invidiously discriminatory statute, those asserting its validity should have the burden of showing such effect. Failure of the state or intervenors to introduce any evidence of the alleged beneficial effect of the statute thus forecloses any further argument on this point at this late stage of the litigation.

Nor were appellants obliged, as they did only out of an abundance of caution, to introduce proof that the New York State legislature intended to create segregated districts. Under the invidious discrimination rule, such proof is legally irrelevant. When basic Constitutional rights are involved, unintended as well as intended violations of those rights are equally prohibited. See, *e.g.*, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 461 (1958); *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 439 (1963). An absence of legislative motive or purpose to segregate has never been deemed a valid defense to segregation, even in those cases in which segregation was not expressly provided for in the statute. See *Eubanks* v. *Louisiana*, 356 U. S. 584, 588 (1958); and see

Branche v. *Board of Education*, 204 F. Supp. 150 (E. D. N. Y. 1962). The courts seem universally to have assumed that, when the invidious discrimination rule applies, the motives or the purpose of the legislature are entirely irrelevant. There is no room in such cases for the alternative 14th Amendment test which would justify a statutory classification whenever the state can show a "reasonable" basis for it, *Morey* v. *Doud*, 344 U. S. 457 (1957).

Even assuming *arguendo* that legislative purpose were deemed legally relevant, plaintiffs in a segregation case need not prove such purpose as part of their *prima facie* case. As in other civil litigation, plaintiffs establish a *prima facie* case by introducing "evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." See 9 WIGMORE, EVIDENCE 299 (1940).

Hence, under the invidious discrimination rule, evidence of a factual pattern of segregation is sufficient to raise a rebuttable presumption of unconstitutionality of state action and shift the burden of producing evidence to the State. *Hernandez* v. *Texas*, 347 U. S. 475, 479-81 (1954); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960). In other words, once a *prima facie* case is proved, a purpose other than a purpose to segregate must be pleaded and proved by the State. It, in form, has the affirmative obligation on this question. It is in a better position to adduce evidence of legislative purpose, and in fairness should be required to prove such purpose. See 9 WIGMORE, EVIDENCE § 2486 (1940). This rule is made both desirable and necessary by the ability of a State, as in this case, to obscure the motives for its actions. Legislatures may normally be deemed to intend the natural consequences of their acts, and proof of the existence of a pattern of segregation should be sufficient to shift the burden to the State to prove that its intentions were otherwise.

Since a full trial was held and the State and intervenors were given full opportunity to rebut appellants' case, but failed to introduce any rebuttal evidence, judgment should have been entered for plaintiffs as Judge Murphy urged. Any matter not within plaintiffs' *prima facie* case must be pleaded and proved by defendants as an affirmative defense. 2 MOORE, FEDERAL PRACTICE 1841-62 (2d ed. 1962). The adversary system wisely shifts the burden so that defendants choosing to sit on their hands must do so at the cost of losing the law suit. Unless this sanction is employed, proper allocation of the burden of producing evidence in segregation cases would be rendered meaningless.

D. Error of the Court Below

The prevailing opinions in the court below failed to find unlawful segregation because they applied erroneous constitutional standards and measures of proof. Judge Moore regarded segregated Congressional districts as constitutional unless such segregation is coupled with substantial under-representation. This view is suggested at several points in his opinion (R. 159, 162-3), and Judge Feinberg criticizes Judge Moore's opinion as adopting this view without contradiction by Judge Moore (R. 171). Because he thus applied an erroneous Constitutional standard, Judge Moore did not discuss the factual record to determine whether or not it would support a finding of purposeful segregation.

Judge Feinberg, while applying the proper constitutional standard, applied erroneously high standards of proof and ignored the import of the evidence in the record so as to render virtually impossible the task of plaintiffs attempting to prove segregation.

(1) Judge Feinberg would require proof of a legislative "motive" to segregate as an indispensable element of the

plaintiff's *prima facie* case. This requirement is erroneous for the reasons elaborated above—namely, that legislative "motive" is constitutionally irrelevant and, even if it is not, proof by plaintiffs of a factual pattern of segregation suffices to make out a *prima facie* case and to shift the burden to the State to produce evidence of an alternative legislative purpose, if there be any.

(2) Judge Feinberg viewed the test as being whether the "only available inference" was that the legislative motive was to segregate, and further stated that plaintiffs have a "difficult burden" of proof, citing cases not involving racial segregation. This language as well as Judge Feinberg's inadequate answer to Judge Murphy's question, "What more must plaintiffs prove?", indicates that he imposed a standard of proof comparable to that required to prove criminal intent by circumstantial evidence. 3 WHARTON, CRIMINAL EVIDENCE § 980 (12th ed. 1955). The quantum of evidence required to put a man in jail is surely greater than that which plaintiffs should be required to adduce in order to establish racial segregation.

Even when all the proof is in, plaintiffs in a civil case need prove their allegations only by a preponderance of the evidence. But their initial burden of coming forward with evidence to establish a *prima facie* invidious discrimination case only requires that they prove that such discrimination is *one* reasonable inference, not the "*only* available" inference. The question should not have been whether segregation was the "only available inference" but rather whether segregation was a sufficiently reasonable inference to warrant shifting the burden to the State to rebut it.

The only way appellants could have satisfied Judge Feinberg's test would have been to raise and rebut every other possible purpose which the legislature might have had in mind. This they could have done only by introducing detailed statistics showing that the composition of the four

districts could not be explained on the basis of any of these possible hypothetical legislative purposes. This test would thus impose a staggering burden upon plaintiffs in a segregation case, and even if they met this standard they might still be faced for the first time on appeal, as are appellants in this case, with the contention that various other inferences might be "available" in the circumstances. (See the State's Motion to Dismiss or Affirm, p. 12).

(3) Judge Feinberg was able to ignore the obvious inference of legislative purpose to be drawn from appellants' proof only by drawing an alternative inference which was wholly outside the record. Judge Feinberg speculated that the purpose of the legislature may have been to classify voters on the basis of "social and economic background," criteria which he did not define and concerning which there was nothing whatever in the record. By thus basing his opinion on a rationale which was neither alleged nor proved by any of the parties, Judge Feinberg made it impossible for appellants to put in issue the highly dubious constitutionality of a classification according to "social and economic background." See *Griffin* v. *Illinois*, 351 U. S. 12 (1956) and *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). This criterion is of highly dubious Constitutionality in this case because its use could easily mask deliberate racial segregation. There can be no doubt that in many areas race and place of origin might be inextricably related to some standard of "social and economic" status. See *Gomillion* v. *Lightfoot*, *supra*, in which the legislature of Alabama could no doubt have created the same forbidden result if it had excluded from the city of Tuskegee all persons of a particular "social and economic background."

(4) Judge Feinberg's opinion assumes the constitutionality of the 1951 statute which was replaced by the 1961 statute herein challenged. On this record, the con-

stitutionality of that earlier statute surely may not be assumed since, *inter alia*, there is no evidence of the racial and group composition of the districts established by that statute at the time it was enacted. Once again, Judge Feinberg's assumption goes entirely beyond the record and has the effect of precluding the plaintiffs from making a record which could rebut it.

(5) Judge Feinberg also grossly misread the factual record. Above all, he failed to consider the various elements of plaintiffs' proof as a whole as required by *Johnson* v. *Virginia*, *supra* p. 23; but rather discussed each element separately. Further, he assumed that the 17th was expanded by the 1961 statute in a "logical fashion" and that "many combinations of possible Congressional district lines, no matter how innocently or rationally drawn would result in comparable figures" (R. 176). As shown above, the expansion of the 17th was anything but logical since two heavily non-white and Puerto Rican areas which logically should have been added were inexplicably omitted, the only areas which were added included an average of 98% white, non-Puerto Ricans, and the district was kept 12-15% smaller than the other three. The record also shows that no combination of possible Congressional district lines could result in one district with a higher percentage of non-whites and Puerto Ricans and another district with a higher percentage of white, non-Puerto Ricans (without further reducing the population of the already undersized 17th and 18th Districts), than has been achieved by the challenged statute.

II. The Challenged Portion of the Statute Abridged Voting Rights in Violation of the Fifteenth Amendment.

The Fifteenth Amendment, like the Fourteenth, bans segregation of voters into separate voting districts even

absent the loss of a right to vote in the same or similar elections. It is a more specific constitutional guarantee which imposes the same standards in respect of voting rights as are imposed by the Fourteenth in regard to rights of citizens generally. The "separate but equal" doctrine is incompatible with both.

The interchangeability, or co-extensiveness, of the Fourteenth and Fifteenth Amendments is demonstrated by the "white primary" cases (all involving, *inter alia*, Congressional elections). *Nixon* v. *Herndon*, 273 U. S. 536 and *Nixon* v. *Condon*, 286 U. S. 73, were decided under the the Fourteenth while *Smith* v. *Allwright*, 321 U. S. 649, (1944) and *Terry* v. *Adams*, 345 U. S. 461, (1953) were decided under the Fifteenth. In all four cases, exclusion of Negroes from participation in the primary election of a single political party or group was invalidated despite the fact that the plaintiffs were not barred from any other primary and would be free under applicable state statutes to organize their own political party with its own primary. *Smith* v. *Allwright* and *Terry* v. *Adams* thus establish that separate but equal Congressional voting constitutes an abridgment within the meaning of the Fifteenth Amendment.

Gomillion v. *Lightfoot*, 364 U. S. 339 (1960) confirmed that segregation of voters into racially based voting districts may constitute a violation of the Fifteenth Amendment. Despite the court's statement that Negro voters had been "deprived" of their municipal vote, they were, on the facts there presented, no more "deprived" of a vote than the plaintiffs in this case. As was pointed out to this Court (Brief for Respondents, p. 12), the Negroes of Tuskegee were free under applicable Alabama statutes to establish their own separate municipality merely by filing a petition signed by 25 persons. Ala. Code Title 37, art. 6 (1958). Indeed, at the time of the adoption of the statute excluding

the Negroes from Tuskegee, it was proposed that the above statute be amended so as to preclude the Tuskegee Negroes from incorporating a new municipality. But this proposal was not adopted. See Lucas, *Gomillion* v. *Lightfoot*, SUPREME COURT REVIEW, 194, 210-11 (1961), in which the author also suggests additional reasons for viewing the case as barring any segregation of voters, even absent a technical loss of voting rights.

Nor can it be supposed that *Gomillion* rested upon a hypothetical loss of municipal services. Since the majority decided the case under the Fifteenth Amendment, the only relevant consideration was the effect upon voting rights, and any effect upon rights to governmental services was without constitutional significance. Moreover, the record contained no information concerning municipal services, tax rates, county services, etc. So far as the record showed, the Negro plaintiffs would continue to benefit from municipal services, or benefit from services of the county into which they were placed, where, for all that was in the record, services may have been superior and the tax rates lower.

Even if the "white primary" cases and *Gomillion* are deemed to rest upon an implicit assumption that the voting units into which the Negroes were segregated deprived them of the full vitality of their voting rights, the instant case is indistinguishable. The voting units into which the non-white and Puerto Rican plaintiffs have been placed give them 12-15% less voting power than the voting unit established by the all-white 17th District. And, by singling out non-whites and Puerto Ricans for separate treatment, the challenged statute involves the same sort of inherent inequality condemned in *Brown* v. *Board of Education* and the cases following it.

Read literally, the Fifteenth Amendment guarantee would apply only to the non-white plaintiffs in this case. However, since the Fifteenth Amendment is merely a more

specific guarantee of rights generally protected by the Fourteenth Amendment, there would be no bar to extending the Fifteenth Amendment guarantee to other classes of citizens, including persons of Puerto Rican origin. ". . . [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar." *United States* v. *Classic*, 313 U. S. 299, 316 (1941).

However, even if the Fifteenth Amendment is to be construed literally, it seems clear that its guarantee would be applicable to persons of Puerto Rican origin via the Fourteenth Amendment. See *Nixon* v. *Herndon* and *Nixon* v. *Condon, supra*. Because the franchise is so basic to all other rights, introduction of discrimination into the electoral framework should be subject to at least the same Constitutional scrutiny as discrimination in courtroom seating, *Johnson* v. *Virginia*, 373 U. S. 61 (1963).

Appellants' proof, for the reasons discussed above in relation to the 14th Amendment, was sufficient to establish a violation of the 15th Amendment under the foregoing Constitutional standard established by that Amendment.

III. Relief

The appropriate relief in this case would be a decree pursuant to 28 U. S. C. § 2201 declaring unconstitutional the challenged portion of the statute. The lower court would then retain jurisdiction, pending a valid redistricting by the New York legislature within a reasonable time and, failing such action, would conduct further proceedings. The legislature would thus be given an opportunity to correct the evils of the challenged portion of the statute.

Such declaration of unconstitutionality resulted in action by the state legislature in *Baker* v. *Carr*, see *Baker* v. *Carr*,

206 F. Supp. 341 (M. D. Tenn. 1962), and in various other cases stemming from this court's decision in that case. See *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. C., Del., 1963); *Sims* v. *Frank*, 208 F. Supp. 431 (D. C., Ala., 1962); *Magraw* v. *Donovan*, 177 F. Supp. 803 (D. C., Minn., 1959). See also *Tombs* v. *Fortson*, 205 F. Supp. 248 (D. C. Ga., 1962) where the court reserved decision to give the legislature an opportunity to correct the abuses of the existing apportionment statute. After a three judge Federal court found a Colorado apportionment statute unconstitutional, without awarding affirmative relief, *Lisco* v. *Nichols*, 208 F. Supp. 471 (D .C. Colo. 1962) the voters adopted a new apportionment plan by state-wide referendum. See *Lisco* v. *Love*, 32 L. W. 2076 (D. C. Colo. 1963).

The New York legislature will have adequate opportunity to enact a law validly redistricting the four Congressional districts of Manhattan prior to the 1964 Congressional elections. The legislature will convene in regular session in January 1964; and the Governor may call a special session of the legislature to enact a redistricting statute, as he did when the statute here challenged was enacted at an extraordinary two-day session.

The Congressmen elected from the four districts whose boundaries are here challenged may hold office until the regular 1964 Congressional elections.* Although elected from a district later declared to be invalid, they would not lose their *de facto* position, and their acts as Congressmen

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*Although the complaint filed July 26, 1962 seeks, *inter alia*, an injunction restraining defendants from conducting the 1962 elections on the basis of the district boundaries of the four Congressional districts in Manhattan, no injunction was issued and the 1962 elections were held while this action was *sub judice*. Consequently, the incumbent Congressmen were elected on the basis of the district boundaries as defined by the challenged portion of the statute.

could not be challenged. See *Sherrill* v. *O'Brien*, 188 N. Y. 185, 212 (1907); see also *Baker* v. *Carr*, 369 U. S. 186, 250 (1962) (concurring opinion), stating that "any relief accorded can be fashioned in the light of well-known principles of equity." For example, in the apportionment cases, legislators holding office under invalid apportionment statutes were convened to enact valid statutes. See *Sincock* v. *Duffy*, *supra*; *Sims* v. *Frank*, *supra*; *Baker* v. *Carr*, after remand, *supra*; *Magraw* v. *Donovan*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded to the three-judge court with instructions to enter a judgment declaring the challenged portion of the statute unconstitutional and for other proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

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